Supreme Court of the United States

October Term, 1957

PETITION FOR REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	PAGE
Preliminary Statement	1
1. The Conflict Between the Industry and the Justice Department Resulting From the Denial of Certiorari	4
2. The Department of Justice Should Be Invited to File Its Views	9
3. New Conflicts in the Second and Ninth Circuits	10
Conclusion	13
Appendix A: *Flintkote Company* v. *Lysfjord* (C.A. 9) 246 F. 2d 368	14
Appendix B: *Technical Tape Corp.* v. *Minnesota Mining & Manufacturing Co.* (C.A. 2), 247 F. 2d 343	17

CITATIONS

Cases:

Flintkote v. *Lysfjord* (C.A. 9) 246 F. 2d 368 ... 2, 10-12
Lawlor v. *National Screen Service Corp.*, 349 U.S. 322 ... 10
Paramount Film Distributing Corp. v. *Village Theatre* (C.A. 10) 228 F. 2d 721 ... 12
Schwing Motor Co. v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.C. Md.), *aff'd per curiam*, 239 F. 2d 176 (C.A. 4) ... 5-9
Technical Tape Corp. v. *Minnesota Mining and Manufacturing Co.* (C.A. 2) 247 F. 2d 343 ... 2, 10-12
The Webster Motor Car Co. v. *Zell Motor Car Co., et al.* (C.A. [illegible]) 234 F. 2d 616 ... 10
U.S. v. *Crown Zellerbach Corporation*, 1956 Trade Cases, par. 68,544 ... 4
U.S. v. *J. P. Seeburg Corporation*, 1957 Trade Cases, par. 68,613 ... 3
U.S. v. *Memphis Retail Packaging Stores Association, Inc.*, 1956 Trade Cases, par. 68,383 ... 4

PAGE

U.S. v. *Michigan Tool Company, et al*, 1956 Trade Cases, par. 68,290 3

U.S. v. *National Linen Service Corporation*, 1956 Trade Cases, par. 68,398 3

U.S. v. *Philco Corporation*, 1956 Trade Cases, par. 68,409 ..... 3, 4

U.S. v. *Rudolph Wurlitzer Co.*, 1957 Trade Cases, par. 45,057, page 66,306 4

Miscellaneous:

Automotive News 5-9

Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation, July 6, 1955 ..... 3, 5

"The Automobile Marketing Practices Study", a Report of the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce, January 19, 1956 4

In The

Supreme Court of the United States

October Term 1957

No. 213.

The Webster Motor Car Company,
Petitioner

v.

Packard Motor Car Company; et al.,
Respondents

PETITION FOR REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Preliminary Statement

Throughout the automotive industry and in legal circles the denial of certiorari in this case is being given an interpretation and significance far different from anything this Court had any reason to envision. It is so disruptive of business practices and Department of Justice enforcement policies as to make review a matter of real public importance.

Also, since the filing of the petition herein, decisions of the United States Courts of Appeal in the Second and Ninth Circuits have been published in the advance sheets

which are in accord with the treatment of this case in the District Court and in conflict with the majority decision below.[1]

Until the denial of certiorari in the present case, industry had acquiesced in the Government's position that the antitrust laws prohibit manufacturer-dealer arrangements for the purpose of restraining or preventing competition between existing dealers selling the same product in competition with each other. Now, the denial of certiorari in the present case is being interpreted as a rejection by this Court of the Government's interpretation of the antitrust laws, and an invitation to ignore the Government viewpoint.

Not only has the Department of Justice opposed all agreements which are directed to restraint or destruction of competition between dealers in the *same* market selling the same trademark or brand commodity; it has gone much further. It has forbidden all manufacturer-dealer agreements which would restrain or destroy even that competition which exists between dealers in *different* markets or territories selling the same make.

The Attorney General, the Honorable William P. Rogers, in opposing a proposed "territorial security" bill for automobile dealers in 1953 expressed the Department's position as follows:

> ". . . The Department of Justice, however, consistently opposes attempts, by industry action or legislation, to impose any limitations or restrictions upon the persons to whom, or the territory within which, an independent business man may resell a purchased commodity. We believe any such restrictions are of an anti-competitive nature, inimical to the public in

[1] *Flintkote v. Lysfjord* (C.A. 9) 246 F. 2d 368; *Technical Tape Corp. v. Minnesota Mining & Manufacturing Co.* (C.A. 2) 247 F.2d 343.

terest and contrary to the basic philosophy of the antitrust laws."[2]

This policy has been implemented by consent decrees in various industries.[3]

The argument is now being widely advanced that the denial of certiorari in the present case is a blessing of the right of a dealer (Zell) in a stated area (Baltimore) to coerce his manufacturer (Packard) into elimination of all existing fellow-dealer competition in the area (from Webster and DeBaugh); and that it is but a corollary that agreements limiting the areas in which dealers may sell, or penalizing them for selling in areas assigned to other dealers, are lawful.

If this Court has any doubt that the Antitrust Division of the Department of Justice considers the decision of the Circuit Court below to be (1) incorrect and (2) an impairment of its task of enforcing the antitrust laws, we urge that the Department be invited to file a statement of its position. After all, the Department, not private parties, has the primary responsibility of enforcing the antitrust laws.

The public importance of review of the present case by this Court has been magnified by the conflict between the decision below and decisions of the Courts of Appeal of the Second and Ninth Circuits reported in advance sheets after the filing of the petition herein. The cases are discussed at pp. 10 to 12, below.

---

[2] Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation, July 6, 1955, p. 9.

[3] For example: *U.S. v. J. P. Seeburg Corporation*, 1957 Trade Cases, par. 68,613 (phonographs); *U. S. v. Michigan Tool Company, et al*, 1956 Trade Cases, par. 68,290 (gear cutting machines); *U. S. v. National Linen Service Corporation*, 1956 Trade Cases, par. 68,398 linen supplies); *U. S. v. Philco Corporation*;

1. *The Conflict Between the Industry and the Justice Department Resulting From the Denial of Certiorari*

A very large number of the 42,000 franchised new car dealers in this country have declared their desire for so-called "territorial security" agreements, under which manufacturers would be permitted to agree with dealers to give them protection within their prescribed territories from the competition of fellow-dealers selling the same make of car, parts, accessories and service.[4]

It is not difficult to understand why a well-established, high-overhead Ford dealer in downtown Washington might like to have the manufacturer agree to protect him from the competition of a relatively low-overhead Ford dealer in Laurel, Md., twenty miles away. However, it is equally understandable that the Laurel dealer would not appreciate being restrained or prevented from selling merchandise he owns anywhere he wants to, so long as he sells and services it in such way as to protect the manufacturer's good will. Of even greater fundamental importance is the right of a Washington buyer to purchase his Ford from a low-overhead, good-service, Ford dealer in Laurel at a substantial saving in money.

In 1955 a bill was introduced in Congress for the specific purpose of exempting territorial security agreements

---

1956 Trade Cases, par. 68,409 (radios, television sets, etc.); *U. S. v. Crown Zellerbach Corporation*, 1956 Trade Cases, par. 68,544 (paper towels and dispensing cabinets); *U. S. v. Memphis Retail Packaging Stores Association, Inc.*, 1956 Trade Cases, par. 68,383 (alcoholic beverages). Cf. restatement of Department of Justice position in *U. S. v. Rudolph Wurlitzer Co.*, 1957 Trade Cases, par. 45,057, page 66,306 (coin operated phonographs).

[4] "The Automobile Marketing Practices Study", a Report of the Subcommittee on Automobile Marketing Practices of the Senate Committee on Interstate and Foreign Commerce, January 19, 1956; pp. 1, 7.

in the automobile field from the anti-trust laws.[5] It was opposed by the Department of Justice, the Federal Trade Commission and others.[6] The bill was not reported favorably by either house, let alone enacted.

Then the Circuit Courts decided the *Webster* and *Schwing*[7] cases. Certiorari was promptly sought.

In the September 30, 1957, issue of *Automotive News*, the leading automotive trade journal, a three-column, headline article entitled "Cancellation Cases at Zero Hour" reported:

> ". . . A Big Three attorney who has followed the cases [the *Webster* and *Schwing* cases] through the Federal judiciary expressed the opinion that a Supreme Court refusal to review the cases, or a decision upholding the factories, might clarify application of the antitrust laws to the closed-territory practice.
>
> "'There may be no need for further territory security legislation,' he said, 'if, as a matter of law, an automobile manufacturer may give an automobile dealer the amount of territorial security from fellow dealers as the Circuit Court of Appeals said Packard could give Zell and Hudson could give Bankert.
>
> "'It might be possible to resume the practice of designated or closed territories, should the Supreme Court rule against Schwing and Webster, without asking Congress for a new law or an amendment to present antitrust laws.'"

At about this same time in September-October 1957, the Department of Justice was considering two territorial-

---

[5] H.R. 6544, 84th Cong., 2d Sess. at p. 2 of Hearings before the House Committee on Interstate and Foreign Commerce, July 6, 1955.

[6] Hearings before the House Committee on Interstate and Foreign Commerce, relating to Automobile Marketing Legislation July 6, 1955, pp. 8-9.

[7] *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.C. Md.), *aff'd per curiam*, 239 F.2d 176 (C.A. 4).

security plans, one proposed by the National Automobile Dealers' Association (NADA), the other by the Authorized Dealers' Survival Association (ADSA). Under NADA's plan the dealer's cost per new car would have been increased $100, and the manufacturer, in turn, would have rebated that sum to the dealer for each new car he sold to a resident of his prescribed "territory." The ADSA plan would have authorized the manufacturer to pay the dealer a bonus of 5% of the factory list price for the new cars he sold to residents of his "territory." The Department of Justice opposed both plans.

Neither the NADA nor ADSA plans went nearly as far as legalizing an agreement between a manufacturer (Packard) and a requesting dealer (Zell) to terminate the franchises of all competing dealers handling the same make of car (Webster and DeBaugh) in the same market (metropolitan Baltimore).

On October 14, 1957, prior to knowledge of denial of certiorari in the present case, *Automotive News* carried a front-page two-column headline article, reporting in part as follows:

> "The Department of Justice last week forced NADA and ADSA to look around for new plans and approaches to a 'service responsibility' program acceptable to the manufacturers and antitrust policemen.
>
> "Assistant U. S. Attorney General Victor R. Hansen, head of the department's antitrust division, opined that both the rebate and bonus plans for in-territory selling, as proposed by NADA and ADSA, respectively, would likely run afoul of Federal antitrust statutes."

A week later, *Automotive News*, in reporting the denial of certiorari in the *Webster* and *Schwing* cases, made the following significant statements (front page, three columns):

"SUPPORT GROWS FOR SUIT
TO TEST SECURITY PACTS

"A U. S. Supreme Court decision bolstered sentiment last week for a 'friendly' court test of territory security.

"The decision, which served to uphold exclusive-dealer agreements, was viewed by numerous key dealers and legal experts as a possible rebuff to the thinking behind anti-territory security policies of the Justice Department.

• • • •

"The Supreme Court injected new fire into the territory-security debate when it refused to review the *Webster* and *Schwing* lawsuits against Packard and Hudson, respectively.

• • • •

"The denial of the dealers' petitions thus upheld as binding two Circuit Court of Appeals decisions which had affirmed the factories' right to appoint exclusive or preferred dealers for a designated market—in these cases, the City of Baltimore.

• • • •

"A 'definite divergence' between the Federal courts and the Justice Department on the territory-security issue was noted by a legal expert who has followed the *Schwing* and *Webster* cases since their beginnings in lower U. S. courts.

"'The Justice Department,' he explained, 'keeps saying that any plan to fence in dealers and pay them bonuses for sales inside the boundaries is illegal. Yet, the Federal judges uphold two factories who pursued the principle on which territory security would be based.

"'It would seem that the attorney general is defining public policy not law. The law, as the courts see it, upheld territory security before and still does.'

• • • •

"The legal conflict stirred up new demands for a court test of a proposed territory-security plan.

• • • •

"An NADA director from a large midwestern state said that the Supreme Court position 'makes it imperative that we straighten this legality thing out.'

"'For years,' he said, 'we've gone along on the opinions of the Justice Department. But the courts decide the other way. Let's find out in the courts once and for all, so we'll know whether we need new legislation or not.'"

On October 28, 1957, the *Automotive News* reported:

"ADSA officials maintained that Hansen's statement was 'one lawyer's opinion, and not necessarily conclusive.' The ADSAers were encouraged by the apparent leaning of the Federal judiciary, as evidenced in the *Schwing* and *Webster* decisions this month, toward a closed-territory philosophy under the antitrust laws."

By refusing to endorse the NADA and ADSA territorial security plans the Justice Department has inferentially, but forcefully, pronounced its continuing disagreement with the decision of the Circuit Court in the *Webster* case. Thus the thousands of new car dealers who claim they desperately need territorial security are caught in the cross-fire of uncertainty created by the conflict between the views of certain Circuit Courts and the Justice Department.

The following critical dilemma has been created:

How much territorial security may automobile manufacturers agree to give their franchised dealers without violating the antitrust laws?

a. The great amount approved by the Circuit Court in the *Webster* case?

b. The more moderate amount sought by NADA and ADSA?

c. Or practically none, as proclaimed by the Justice Department and Federal Trade Commission?

There is nothing to indicate that the industry's confusion is abating. According to the November 4, 1957, "*Automotive News*", p. 2, the Missouri, Wisconsin and Illi-

nois Automobile Dealers Associations have just adopted separate resolutions urging that the Justice Department's opposition to territorial security be put to a court test.

> "The Wisconsin group reaffirmed its position last week by alluding to the 'difference in viewpoint between the U. S. Supreme Court and the Antitrust Division attorneys on the questions of protected territory and closed territory.' . . . The Wisconsin association said the Supreme Court departed from the Justice Department's thinking last month when it ruled, in effect, that factories could limit the number of dealers in any particular area. This ruling came in appeals of the *Webster* and *Schwing* antitrust damage suits against Packard and Hudson, respectively."

By reviewing this case, and, perhaps inviting the Department of Justice to file a brief, this Court can give sorely-needed guidance to a bewildered but important segment of our economy—the entire automobile industry. Many other industries distributing their products through competing franchised dealers are similarly involved.

2. *The Department of Justice Should Be Invited to File Its Views*

If there is any doubt that the Department of Justice considers the opinion of the Circuit Court below to be both incorrect and an obstacle to enforcement of the antitrust laws, we urge that the Department be invited to file its views with this Court.

It is perhaps understandable that ordinarily the Department would wish to refrain from taking sides in private litigation. And yet, if the Antitrust Division intends to pursue policies which thousands of new car dealers believe to be in conflict with the decisions of the Court of Appeals here and in the Fourth Circuit, an explanation is in order. Otherwise the great number of franchised automobile dealers vitally interested in

this matter will have every reason to feel "that the Attorney General is defining public policy, not law."

Had the Government proceeded in the District Court against Packard (and even if, unlike petitioner, it had lost there), a right of direct appeal would have brought the case promptly to this Court (15 U.S.C. 29). We pray that some weight will be given to the fact that instead of riding on the Government's coattails, or waiting to follow in the wake of a Government antitrust victory, petitioner, at its own expense and after the destruction by respondents of its business which the jury valued at $190,000, diligently pursued both Packard and Zell through *two* Circuit Courts [see *The Webster Motor Car Co.* v. *Zell Motor Car Co., et al* (C.A. 4), 234 F.2d 616].

Granting to petitioner a right to Supreme Court review would give great substance to Chief Justice Warren's pronouncement in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 at 329, that treble damage actions are an important aid to the enforcement of the antitrust laws. Certainly no such aid will exist if one in Webster's position is denied review of a case so important in view of the industry reaction above described and the recent conflicts next to be described,—a case which in the Courts below found Judges Bazelon and Holtzoff, plus the jury, with Webster; and Chief Judge Edgerton and Judge Prettyman with Packard.

3. *New Conflicts in the Second and Ninth Circuits*

The unfortunate uncertainty and confusion discussed in the preceding paragraphs is enhanced by decisions in the Ninth and Second Circuits published since the filing of the petition for certiorari herein: namely, *Flintkote* v. *Lysfjord* (C.A. 9), 246 F. 2d 368, published in the advance sheets of September 30, 1957, and *Technical Tape Corp.* v. *Minnesota Mining & Manufacturing Co.* (C.A. 2) 247 F. 2d 343, published in the advance sheets of October 21,

1957. The relevant parts of these opinions are attached as Appendices A and B of this petition.

These decisions squarely conflict with the decision below. The conflict is this:- In the Second and Ninth Circuits, if, as the result of an agreement with one or more dealers, a manufacturer refuses to continue to deal with other competing dealers, a question of fact as to the reasonableness of the restraint imposed is presented for determination by the jury under proper instructions. Not so in the District of Columbia Circuit where such agreements will be held to be lawful *per se* if the District Court Judge happens to be of a personal view that there are available other commodities as "reasonably interchangeable" with the product in question as cellophane is with glassine, waxed paper and foil.

Flintkote holds that a manufacturer's freedom to sell to anyone or no one is not absolute; that the question whether a manufacturer's conduct is an innocent and lawful exercise of its private right, or is a participation in an unlawful conspiracy or in aid of monopolistic ends, is properly submissible to a jury in the perspective of all the circumstances of each case; and that the fact that the manufacturer was coerced by economic threats is not a defense. The *Flintkote* decision is precisely in accord with the instructions under which the District Court submitted petitioner's case to the jury. It is in conflict with the majority decision in the *Webster* case, which set aside the verdict, not because of insufficient evidence for a verdict under the instructions, but on the ground that Packard's right to agree with Zell to eliminate Zell's competitors was unqualified, even though the agreement was entered into because of Zell's threat to give up its franchise if it was not given a monopoly of the Baltimore Packard market.

Technical Tape holds that while ordinarily a manufacturer may refuse to deal with a distributor for rea-

sons sufficient to itself, this right must be exercised in good faith, and may not be exercised in such manner as to substantially lessen competition or tend to create a monopoly in any line of commerce. This holding also is in accord with what the District Judge told the jury and the dissenting Circuit judge approved in petitioner's case; and is in conflict with the majority holding that it was as a matter of law improper to submit the case to the jury on such grounds.

It will be remembered that the propriety of submission to the jury of the reasonableness of an exclusive dealership was specifically declared by the Tenth Circuit in *Paramount Film Distributing Corp.* v. *Village Theatre* (C.A. 10) 228 F. 2d 721. That decision, citing with approval the District Court here, is cited in petitioner's petition for certiorari. Also in the petition, pp. 13-17, are cited eight other decisions in the First, Second, Third, Fourth, Sixth and Seventh Circuits which conflict with the Circuit Court decision below.

We believe that the pronouncements as to antitrust law in *Webster* are so in conflict with those in *Flintkote*, *Technical Tape* and *Village Theatre*, and are so susceptible of divergent litigation-promoting interpretations, as to make clarification by this Court desirable.

Petitioner's case is immediately available as an appropriate vehicle. It involves, and full discussion will therefore tend to settle, the question which is common to both exclusive dealerships and territorial protection — namely, the reconciliation, under the Rule of Reason, of conflicts between the right of manufacturers to agree with a dealer or dealers to refuse to deal with other competing dealers and the Sherman Act's prohibition of agreements in unreasonable restraint of interstate commerce.

Conclusion

For all the foregoing reasons petitioner asks the Court to reexamine and to grant its petition for certiorari.

THE WEBSTER MOTOR CAR COMPANY
By its attorneys:

WILLIAM J. HUGHES, JR.
821 - 15th Street, N.W.
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Maryland

Certificate of Counsel

I, William J. Hughes, Jr., attorney for petitioner, hereby certify that the foregoing petition is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 of the Rules of the Supreme Court.

WILLIAM J. HUGHES, JR.

APPENDIX A

Flintkote Company v. Lysfjord (C.A. 9) 246 F. 2d 368; reported in the advance sheets of September 30, 1957.

A dealer in Flintkote's acoustical tile brought a treble damage action against several competitors handling the same product and Flintkote, alleging that the competing dealers induced Flintkote to discontinue selling to plaintiff by threatening to discontinue their purchases unless Flintkote stopped selling to plaintiff. A settlement with the competing dealers was effected pendente lite, and the case went forward against Flintkote alone. The Circuit Court held that the evidence warranted submission of the case to the jury, and its verdict for plaintiff; but remanded on the issue of damages. With respect to liability, the following statements were made by the Court at pp. 374, 375, 376, and 377:

> "Defendant maintained its refusal to deal with plaintiff was a legitimate business decision; that it had no part in the alleged conspiracy among the original 'Association defendants' to restrain trade.
>
> * * *
>
> "If that refusal was not the result of the exercise of ordinary business judgment, but the result of threats made and pressure applied by members of the known conspiracy to and against Flintkote, the act of refusing to sell would constitute knowing participation. Because one is coerced by economic threats to participate in or aid and abet an illegal scheme does no excuse the actor."
>
> * * * *
>
> "Where there has been proof (a) that a conspiring group of tile dealers disclosed to a supplier, directly or by inference, an accomplished unlawful purpose and intent to boycott non-participating dealers, (and hence disclosed the existence of a conspiracy) and (b) thereafter one or more dealers had threatened

the supplier on numerous occasions that they intended jointly and severally to refuse to buy from the supplier if the supplier continued to sell acoustical tile to plaintiffs, and (c) if the supplier, having been selling to non-conspirators, thereafter refused to sell to non-conspiring dealers because of the threats, it cannot be maintained, as a matter of law, that such decision not to sell was a lawful exercise of the supplier's business judgment.

"It is true that one engaged in private enterprise may select his own customers, and in the absence of an illegal agreement, may sell or refuse to sell to a customer for good cause, or for no cause whatever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper perspective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.

"Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state—'despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I'm innocent and cannot be held liable because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be.'

* * * *

"The rule of freedom of sale to anyone or no one is not absolute. Nor can it be tested in a vacuum. The *Colgate* case [*United States* v. *Colgate & Co.*] 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992,

> 'was not intended to give blanket sanction for individual discretion in refusal to deal. The Court soon determined that its holding did not extend to protect a course of dealing which *inferentially* spelled out the factor of agreement that Colgate lacked. More important, the Court's landmark decision in *Federal Trade Commission*

v. *Beech-Nut Packing Co.* places any refusal to deal in its business perspective and then against the full facts scrutinizes all pertinent antitrust prohibitions the trade pattern suggests.

'Viewed in the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of Section 1 of the Sherman Act *** Also, Section 2 may forbid refusals to deal for monopolistic ends. *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 1927, 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684.'

'[Report of the Attorney General's National Committee to Study the Antitrust Laws, March 21, 1955.]'"

[Note: The opinion was written by Hon. Stanley N. Barnes, J. who shortly before, as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, had declared and implemented the Department policy discussed in Point 1 of this petition for rehearing.]

APPENDIX B

Technical Tape Corp. v. Minnesota Mining & Manufacturing Co. (C.A. 2) 247 F. 2d 343; reported in the advance sheets of October 21, 1957.

In a declaratory judgment action to have defendant's patent declared invalid, or, if valid, then not infringed, defendant counterclaimed for damages from infringement, and plaintiff's reply charged that misuse by defendant of its patent deprived it of a right to relief. In analyzing the evidence and concluding that plaintiff's defense of lack of clean hands was not established, the court made the following statement at p. 358 of the controlling principles on which the propriety of defendant's conduct was to be judged:

> "A manufacturer has the right to stop dealing with a distributor or jobber who is acting unfairly towards his product or is trying to undermine his trade. That seems to be a proper corollary of *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, at page 614, 34 S. Ct. 951, at page 955, 58 L. Ed. 1490, where it was held that:
>
> > 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.'
>
> "Ordinarily a manufacturer may refuse to deal with a distributor or jobber for reasons sufficient to himself. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992; *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 97, 40 S. Ct. 251, 64 L. Ed. 471; and *Brosious* v. *Pepsi-Cola Co.*, 3 Cir., 155 F. 2d 99, 101-102. Of course, this right of a manufacturer must be exercised in good faith, and within the restrictions of the Clayton Act, and may not be exercised in such a manner so as to 'substantially lessen competition' or 'tend to create a monopoly' in any line of commerce.

"The record in the case does not establish that 3M's refusal to sell to five of the abovenamed distributors was done in bad faith, and had as its purpose to substantially lessen competion, or had a tendency to create a monopoly. Further, the Clayton Act was not intended to reach every remote lessening of competition. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356-357, 42 S. Ct. 360, 66 L. Ed. 653.

"There has been no showing here that 'competition has been foreclosed in a substantial share of the line of commerce affected,' by the so-called select distributorship policy. *Standard Oil Co. of Cal. and Standard Stations* v. *United States*, 337 U.S. 293, 69 St. Ct. 1051, 1062, 93 L. Ed. 1371; *Dictograph Products* v. *Federal Trade Commission*, 2 Cir., 217 F.-2d 821, 825. This is not a case where the manufacturer imposed a uniform exclusive dealing confract on its jobbers and distributors, such as was the situation in the *Dictograph* and *Russell* cases, hereinbefore cited, on which plaintiff relies."